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Ananda Dharmalingam v Chantella Honeybee Sargon

HIGH COURT (KUALA LUMPUR) — DIVORCE PETITION NO S8(S4)33–837 OF 2000

B FAIZA TAMBY CHIK J

9 NOVEMBER 2004

Civil Procedure — Stay of proceedings — Application for — Stay order — Effect of stay

C *order — Whether stay merely hold matters in status quo alters the legal rights of the parties*

Evidence — Burden of proof — Divorce — Wife needs interim maintenance — Whether wife's duty to prove the amount needed

D

Family Law — Children — Maintenance — Retaining children in contravention of court order — Whether party retaining children in contravention of court order entitled for maintenance

E

Family Law — Divorce — Maintenance — Interim maintenance — Frank and full disclosure — Whether inference of lack of frank and full disclosure could be drawn without giving notice to proceed with ancillary relief — Divorce and Matrimonial Proceedings Rule 1980 r 61

F

Family Law — Divorce — Maintenance — Extent of applicability of English law — Whether English principles applicable in Malaysia when exist specific provisions governing the area

G

Family Law — Divorce — Maintenance — Wife and Children — Test for awarding interim maintenance — Whether 'means and needs test' and 'means and station in life of the husband test' respectively need to adopted — Whether husband's parents' station in life should be considered — Law Reform (Marriage and Divorce) Act 1976 ss 78 and 92

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This was an application by the respondent wife ('the wife') for interim maintenance. The petitioner husband ('the husband') had de facto custody, care and control of the two children of the marriage since 6 August 2000 and interim guardianship, custody, care and control of the two children since the order dated 18 August 2000 (which order was subsequently extended on 30 August 2000 and 13 September 2000 with the wife's consent). The children had remained in the custody, care and control of the husband, living with the husband in his parent's home for three years, with access to the wife. This was the status quo until 15 April 2003 when the children were not returned to the husband after the wife's access. Thereafter the wife had retained the

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children. On 14 October 2003, a final order was made by the court granting guardianship, custody, care and control of the two children to the husband. The wife had filed an appeal and obtained a stay pending appeal. The appeal was fixed for hearing on 11 October 2004 at which point this whole issue of maintenance pending suit may become moot and academic. The status quo that currently exists and which forms the basis of the wife's application had been created by the wife by her own actions in retaining the children since 15 April 2003 in direct contravention and with total disregard of orders made by the court, giving guardianship, custody, care and control to the husband. The wife in support of her application made extensive reference to the wealth of the husband's family. The wife's counsel also submitted that the husband had failed to provide full and frank disclosure of his means in his affidavit and relied on English cases to support the wife's case.

Held, dismissing respondent's application:

(1) The wife cannot be allowed to have her actions condoned in retaining the children in contravention of court orders by now asking this court to order maintenance against the party who in fact had legal guardianship, custody, care and control of the children (see para 2).

(2) The order for stay does not reverse the order granting final guardianship, custody, care and control of the children to the husband, and the wife's retention of the children remains unlawful, the stay merely holding matters in status quo but not altering the legal rights of the parties (see para 5).

(3) By virtue of s 78 of the Law Reform (Marriage and Divorce) Act 1976, the only test that this court needs to adopt in deciding if (interim) maintenance should be awarded to the wife is the means and needs of the parties (see para 7). By virtue of s 92 Law Reform (Marriage and Divorce) Act 1976, the only test that this court needs to adopt in deciding if (interim) maintenance should be awarded to the children in these proceedings is the means and station in life of the husband (see para 9).

(4) The wife in the application contended that she needed RM6,800 in maintenance. However, the wife had not satisfied or discharged her duty to evidence that she did indeed need this sum of money. The application herein was an excessive and unjustified amount (see para 7).

(5) The wife made extensive reference to the alleged wealth of the husband's family. None of this wealth belonged to the husband. The husband's parents' station in life could not be ascribed to the husband (see para 9).

(6) The duty of frank and full disclosure as envisaged by the wife's counsel's submission is only intended where there is a notice to proceed with an application for ancillary relief. No such notice had been served on the petitioner husband in these proceedings. The application by the wife was by way of a summons in chambers for interim maintenance. It was only upon service of the notice that r 61 of the Divorce and Matrimonial Proceedings Rule 1980 and the inferences were applicable (see para 10).

(7) The husband was never served with a notice to proceed with ancillary relief, nor was he requested by letter to give 'further information', and accordingly the inference of lack of full and frank disclosure as contended by the wife does not even arise (see para 12).

(8) There must be in the first place the process by which demands were made, documents exchanged, and cross-examination had taken place, before any adverse inference (lack of full and frank disclosure) can be drawn against the said party with respect to such means (see para 13).

(9) English principles can only be applied in Malaysia where there are no specific provisions in our own statute regarding a particular matter. On the facts of this case, there are clear provisions in the Law Reform (Marriage and Divorce) Act 1976 with regards to maintenance and the assessment thereof. Where there are specific provisions, the English principles and cases may be applied to assist in interpretation only if they are similarly worded statutes or provisions and, even in that event English decisions, are merely of persuasive effect (see para 16).

[Bahasa Malaysia summary

Ini adalah satu permohonan oleh responden isteri ('isteri') untuk nafkah interim. Pempetisyen suami ('suami') mendapat penjagaan dan kawalan de facto ke atas dua orang anak hasil pekahwinan sejak 6 Ogos 2000 dan hak penjagaan dan kawalan interim ke atas dua orang anak tersebut sejak perintah bertarikh 18 Ogos 2000 (perintah itu telah dilanjutkan pada 30 Ogos 2000 dan 13 September 2000 dengan persetujuan isteri). Anak-anak tersebut masih berada dalam penjagaan dan kawalan suami, dan tinggal dengan suami di rumah ibubapanya selama tiga tahun, dan isteri mendapt akses. Inilah status quo sehingga 15 April 2003 apabila anak-anak tersebut tidak dipulangkan kepada suami selepas isteri mendapat akses mereka. Berikutan itu isteri telah menjaga anak-anaknya. Pada 14 Oktober 2003, satu perintah muktamad telah dibuat oleh mahkamah membenarkan hak penjagaan dan kawalan dua anaknya kepada suami. Si isteri telah memfailkan satu rayuan dan memperoleh satu penggantungan sementara menunggu rayuan tersebut selesai. Rayuan tersebut telah ditetapkan untuk perbicaraan pada 11 Oktober 2004 di mana keseluruhan isu nafkah sementara menunggu guaman boleh dipertikaikan dan menjadi akademik. Staus quo yang wujud kini dan membentuk asas permohonan isteri telah dibentuk oleh isteri melalui tindakannya sendiri menahan anak-anaknya sejak 15 April 2003 yang bertentangan dan tidak menurut perintah yang dibuat oleh mahkamah, memberikan hak penjagaan dan kawalan kepada suami. Bagi menyokong permohonan si isteri, beliau telah membuat rujukan meluas terhadap kekayaan keluarga suami. Peguam isteri juga berhujah bahawa suami telah gagal untuk mengemukakan butiran penuh dan sebenar sumbernya dalam afidavitnya dan bergantung kepada kes-kes Inggeris untuk menyokong kes isteri.

Diputuskan, menolak permohonan responden:

(1) Si isteri tidak boleh dibenarkan tindakannya menahan anak-anak tersebut yang bertentangan dengan perintah mahkamah dengan mengemukakan

permohonan kepada mahkamah untuk memerintahkan nafkah terhadap pihak yang sewajarnya mempunyai hak penjagaan dan kawalan sah anak-anak tersebut (lihat perenggan 2).

(2) Perintah untuk penggantungan tidak mengakaskan siapa yang sememangnya mempunyai hak penjagaan dan kawalan sah anak-anak tersebut kepada suami, dan penahanan isteri terhadap anak-anak tersebut adalah menyalahi undang-undang, maka penggantungan tersebut hanyalah mengekalkan staus quo perkara tersebut tetapi tidak mengubah hak sah pihak-pihak (lihat perenggan 5).

(3) Menurut s 78 Akta Membaharui Undang-Undang (Perkahwinan dan Perceraian) 1976, satu-satunya ujian yang mahkamah ini perlu gunapakai dalam memutuskan jika nafkah (interim) wajar diawardkan kepada si isteri adalah berhubung sumber dan keperluan pihak-pihak (lihat perenggan 7). Menurut s 92 Akta Membaharui Undang-Undang (Perkahwinan dan Perceraian) 1976, satu-satunya ujian yang mahkamah ini perlu gunapakai dalam memutuskan jika nafkah (interim) wajar diawardkan kepada anak-anak tersebut dalam prosiding berikut adalah sumber dan keadaan kehidupan suami (lihat perenggan 9).

(4) Si isteri dalam permohonan menegaskan bahawa beliau memerlukan RM6,800 untuk nafkah. Namun, si isteri tidak memenuhi atau kelepaskan dirinya daripada kewajipan memberikan keterangan bahawa beliau sememangnya memerlukan sejumlah wang itu. Permohonan ini adalah melampau dan jumlahnya tidak dijustifikasikan (lihat perenggan 7).

(5) Si isteri telah membuat rujukan meluas terhadap kekayaan keluarga suami. Kekayaan ini bagaimanapun bukan milik suami. Keadaan kehidupan keluarga suami tidak boleh dianggap sama seperti suami (lihat perenggan 9).

(6) Kewajipan memberikan butiran sebenar dan sepenuhnya seperti yang dibayangkan oleh hujah peguam si isteri hany diniatkan di mana terdapat notis untuk meneruskan satu permohonan untuk relief sampingan. Tiada notis sedemikian telah disampaikan ke atas pempetisyen suami dalam prosiding tersebut. Permohonan oleh si isteri adalah melalui saman dalam kamar untuk nafkah interim. Hanya selepas penyampaian notis tersebut maka k 61 Kaedah-Kaedah Prosiding Perkahwinan dan Perceraian 1980 dan inferens tersebut adalah terpakai (lihat perenggan 10).

(7) Suami tidak pernah disampaikan ke atasnya notis untuk meneruskan relief sampingan maupun beliau memohon melalui surat untuk memberikan 'further information', dan sewajarnya inferens tentang butiran yang tidak penuh dan benar seperti yang dihujahkan oleh isteri tidak pernah timbul (lihat perenggan 12).

(8) Bahkan perlu ada proses di mana terdapat tuntutan dibuat, pertukaran dokumen dan pemeriksaan balas berlaku sebelum apa-apa inferens (butiran yang tidak penuh dan benar) boleh dibuktikan terhadap pihak yang dikatakan itu berkaitan sumber sedemikian (lihat perenggan 13).

(9) Prinsip-prinsip Inggeris hanya boleh terpakai di Malaysia di mana tiada peruntukan spesifik dalam statu di sini berkaitan suatu perkara. Berdasarkan

fakta-fakta kes ini, terdapat peruntukan nyata dalam Akta Membaharui Undang-Undang (Perkahwinan dan Perceraian) 1976 berhubung nafkah dan penilaiannya. Di mana terdapat peruntukan spesifik, prinsip-prinsip dan kes-kes Inggeris boleh digunakan untuk membantu dalam pentafsiran hanya jika ianya mempunyai statut atau peruntukan yang sama istilahnya dan jikapun terdapat keputusan Inggeris, ianya hanya mempunyai kesan untuk meyakinkan (lihat perenggan 16).]

Notes

For a case on divorce, see 7(1) *Mallal's Digest* (4th Ed, 2003 Reissue) para 389.
For cases on application for stay of proceedings, see 2 *Mallal's Digest* (4th Ed) Consolidated Subject Index paras 5771–5794.
For cases on divorce maintenance, see 7(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 3062–3073.
For cases on maintenance of children, see 7(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 2856–2867.

Cases referred to

J v J [1955] P 214
Leow Kooi Wah v Phillip Ng Kok Seng & Anor [1995] 1 MLJ 852
Lim Bee Kee v Leong Ah Chuan [1998] 1 MLJ 675
McEwan v McEwan [1992] 2 All ER 708
Newton v Newton (1990) 1 FLR
Townson v Mahon (1984) FLR 690

Legislation referred to

Divorce and Matrimonial Proceedings Rule 1980 rr 61, r 65(4), 84
Law Reform (Marriage and Divorce) Act 1976 ss 47, 78, 92
Matrimonial Causes Act 1973 s 25(2)
Matrimonial Causes Act 1973 [UK] s 25
Matrimonial Proceedings (Magistrates' Courts) Act 1960 s 2(1)(b)

SY Foo (YN Foo & Partners) for the petitioner husband.
SY Chew (Kamaruddin & Partners) for the respondent wife.

Faiza Tamby Chik J:

[1] The application before me today is the respondent wife's ('the wife') application for interim maintenance. The particular facts of this case and the legal position of the parties are peculiar to this case and this application for maintenance must be viewed against those facts. Here, the petitioner husband ('the husband') had de facto custody, care and control of the two children of the marriage since 6 August 2000 and interim guardianship, custody, care and control of the two children since the order dated 18 August 2000 (which order was subsequently extended on 30 August 2000 and 13 September 2000 with the wife's consent). The children had remained in the custody, care and control of the husband, living with the husband in his parent's home for three years, with access to the wife. This was the status quo until 15 April 2003 when the children were not returned to the husband after the

wife's access. Thereafter the wife has retained the children. On 14 October 2003, a final order was made by the court granting guardianship, custody, care and control of the two children to the husband. The wife has filed an appeal and obtained a stay pending appeal. The appeal is fixed for hearing on 11 October 2004 at which point this whole issue of maintenance pending suit may become moot and academic. The status quo that currently exists and which forms the basis of the wife's application has been created by the wife by her own actions in retaining the children since 15 April 2003 in direct contravention and with total disregard of orders made by this court, giving guardianship, custody, care and control to the husband.

[2] I think the wife cannot be allowed to have her actions condoned in retaining the children in contravention of court orders by now asking this court to order maintenance against the party who in fact has legal guardianship, custody, care and control of the children. Cognizance must be taken of the fact that the Court of Appeal ordered a stay of the final custody order because they were of the view that the husband's rightful action to enforce the order should have been to engage in committal proceedings against the wife (see para 7 of the husband's second affidavit affirmed on 7 September 2004). I am of the opinion that the stay in no way reversed the existing final order, and in no way condoned the actions of the wife in wrongfully keeping the children with her. In fact, the order for stay compels me to leave the de facto status as it stands pending the appeal. It does not give custody or any legal rights to the wife. In the light of the legal positions and the fact that the appeal is coming on for hearing on 11 October 2004, in exactly two weeks from Monday 27 September 2004, this issue of interim maintenance may become academic. There is ample authority for the proposition that this court should be slow to sanction a party's wrongful behaviour which has the effect of consolidating the position created by that party's wrongdoing and to create a situation which, in the long run, might well give rise to prolonged uncertainty in relation to the children's situation (see *Townson v Mahon* (1984) FLR 690 at p 697).

[3] The law on the provision and assessment of maintenance in Malaysia is clearly set out our Law Reform (Marriage and Divorce) Act 1976 ('LRA'). In relation to spousal maintenance, s 78 of the LRA states that:

> In determining the amount of any maintenance to be paid by a man to his wife or former wife or by a woman to her husband or former husband, the court shall base its assessment primarily on the means and needs of the parties, regardless of the proportion such maintenance bears to the income of the husband or wife as the case may be, but shall have regard to the degree of responsibility which the court apportions to each party for the breakdown of the marriage.

[4] Section 78 of the LRA is clear in that the criteria that the court needs to consider when considering maintenance for the wife is the 'means and needs of the parties'. With regard to the assessment of maintenance for the children, the test is as set out in s 92 of the LRA, that is:

> Except where an agreement or order of court otherwise provides, it shall be the duty of a parent to maintain or contribute to the maintenance of his or her children, whether they are in his or her custody or the custody of any other person, either by providing them with such

A accommodation, clothing, food and education as may be reasonable having regarding to his or her means and station in life or by paying the cost thereof.

B **[5]** I am of the view that on the particular facts that are before this court, no order for maintenance are before this court, for maintenance should be made. I also reiterate that the order for stay does not reverse the order granting final guardianship, custody, care and control of the children to the husband, and it is my opinion that the wife's retention of the children remains unlawful, the stay merely holding matters in status quo but not altering the legal rights of the parties. Every application for maintenance should be considered on its own facts. The facts of this case are set out C briefly here as derived from the petitioner's first affidavit in reply affirmed on 20 July 2004 (encl 170). The relevant facts are on November 1997 the parties and their two children return to Malaysia from Australia and move in to live with the husband's parents at their home at Lingkungan U Thant. On 13 June 2000, the wife unilaterally moved out of the parents' home into an apartment owned by the D husband's mother's family company. Shortly after, the husband and children moved to live with the wife. On 3 August 2000, the wife insisted the husband leave the apartment. On 6 August 2000, the children also returned to the petitioner's parents' home. On 18 August 2000, the husband obtained an ex parte interim order for custody, care and control of the children. On 30 August 2000 and 13 September 2000, the order for interim custody to the husband was extended with the wife's E consent. The children remained at the parents' home and in the husband's sole custody, care and control for three years at the parents' home at Lingkungan U Thant. During the course of the proceedings, Datin Paduka Rahman Hussain J (as she then was) interviewed the children on three separate occasions over the three years during which time the children had never expressed any unhappiness with the F then arrangement. The issue in the trial before the learned High Court judge was the respondent's illness of depression and her inability to care for the two children with special needs. On 15 April 2003, the wife failed to return the children after access, alleging distress on the part of the children. On 21 April 2003, school reopened for the new term and the children were not sent to school by the wife for the whole three months of that term despite request by the husband. On 14 October 2003, a final G order granting full guardianship, custody, care and control of the children was awarded to the husband upon the learned judge finding as a fact that 'there is strong and compelling evidence that the respondent is not a fit and proper person to be granted guardianship, custody, care and control'.

H **[6]** The financial arrangements of the parties were as follows: The parties and their children lived with the husband's parents at their home at 19, Lingkungan U' Thant, Kuala Lumpur. the husband was working in the government sector as a doctor at the Selayang Hospital, completing his compulsory government service, drawing an income of RM2,000 (see exh 'AD 12' to the husand's afidavit jawapan kedua affirmed I on 7 September 2004). The children's expenses living in the same household were paid for by the husband's parents. When the wife insisted on moving out to the apartment in June 2000 and the children and the husband joined her there to try to work things out, the husband's parents agreed to provide an allowance of RM5,000 a month, inclusive of RM2,000 for the rental of the apartment. This arrangement lasted 2 months until the husband returned to the parents' home on the insistence

of the wife on 3 August 2000 and the children returned thereafter on 6 August 2000. The wife remained at the apartment. Thereafter, the husband's parents stopped paying the rental. the husband himself, then a government doctor in Selayang was unable to afford the rental of the apartment. From 6 August 2000 to 15 April 2003 (three years), the husband and children lived at the husband's parents' home pursuant to the three interim court orders, the wife having day access to the children and one overnight access a week. On 15 April 2003, the wife refused to return the two children after access and has retained them ever since at the apartment in contravention of the interim orders and final custody order giving the husband full guardianship, custody, care and control of the two children. the husband has had no access to the children and the children have not been sent to school since the husband finished his compulsory government service in Selayang Hospital at the end of last year. He commenced private practice only this year as an employee of Newborn & Child Health Service Sdn Bhd, a company set up and financed entirely by a bank loan obtained from the Bangkok Bank which is secured and guaranteed by the husband's parents. As a new doctor entering private practice, having just left compulsory government practice, the husband was in no financial position to set up a practice of his own and hence had to seek financial assistance in the form of a bank loan from Bangkok Bank secured by guarantees from his parents. It is wholly inconceivable that, the practice having only commenced in March 2004 this year, and the practice not having generated any income sufficient to meet the bank loan and overhead, that the husband should be paid any more than the RM3,000.00 per month gross salary and, after compulsory deductions, nett salary of RM2,691.90. This is higher than the salary he received from government service. Upon the children's return to Malaysia, the husband's parents had paid the children's school fees at Alice Smith as the husband's income was not sufficient. The wife had refused to allow the children to return to school at the start of the new school term on 21 April 2003. Despite requests through the husband's solicitors, the wife refused to send the children to school for the whole of that term from 21 April 2003 to 11 July 2003. On 26 June 2003, the husband received a request from the school for payment of the first term fees for the following academic year 2 September 2003 to 12 December 2003. On 4 August 2003, the husband wrote a letter to the Alice Smith School for an indulgence to have the third term fees paid by the parents amounting in total to RM15,059 transferred over as fees for the first term of the new academic year 2003 to 2004. This was rejected by the school. In the circumstances and in light of the wife's clear and unwavering stance in refusing to send the children to school for the last three months, that is for a whole term from 21 April 2004, on 27 August 2003, and faced with the prospect of having to pay another RM18,008 towards the new term, ie the September 2003 to December 2003 fees, with no prospect of the wife sending the children to school, the husband was compelled to give notice of withdrawal to the Alice Smith School. the husband (and in actuality the husband's parents) had by then already incurred losses in respect of the last term fees of RM15,059.

[7] Having dealt with the above facts, I will reiterate the two separate tests set out in the LRA (one for the wife and another for the children) that must be considered in considering maintenance for the wife and children herein. By virtue of s 78 of the LRA set out aforesaid, the only test that this court needs to adopt in deciding if (interim) maintenance should be awarded to the wife in these proceedings is the

means and needs of the parties. The wife in the application herein contends that she needs RM6,800 in maintenance. However, the wife has not satisfied or discharged her duty to evidence that she does indeed need this sum of money. Indeed, the breakdown put forward by the wife at para 8 of her affidavit affirmed on 21 June 2004 does not add up to the amount of RM6,800. Further, the matters detailed in the said breakdown have not been evidenced by any receipts or bills or any form of documentation or other evidence whatsoever. It is therefore my finding that the wife has not adequately and/or properly evidenced her needs and that the figure of RM6,800 claimed by the wife in the application herein is an excessive and unjustified amount. the husband in this case had been working in government service until recently. He left government practice at the end of last year. He only began working as a doctor in private practice from March 2004. In the circumstances, this is a husband who had only just started out in his career in private practice.

[8] He is merely a novice and cannot possibly be on par with the other experienced consultants in Gleneagles with whom the husband is now in competition. It is absurd for the wife to expect the husband to have, automatically upon leaving government service, become a wealthy private practitioner at Gleneagles. The fact is that the husband's practice at Gleneagles, of which the husband is an employee, is barely six months old. It is entirely conceivable that any new practice would require a huge capital outlay and initially even see losses until the capital outlay is met with income generated over time. Any new practice will take time to turn around and see a profit. In these circumstances, it is thus wholly realistic and reasonable that the husband's monthly salary is within the RM3,000 bracket at the current time, as shown in the exhibits annexed as 'AD-1' to encl 170; the husband's gross monthly income being RM3,000, and after deductions for EPF, his nett income per month being only RM2,691.90.

[9] By virtue of s 92 of the LRA, the only test that this court needs to adopt in deciding if (interim) maintenance should be awarded to the children in these proceedings is the means and station in life of the husband. In relation to the station in life of the husband, it must be noted that of a doctor only at the beginning of his career as a doctor in private practice, drawing an initial income, from a practice that had only just commenced, and being in competition with other experienced consultants at Gleneagles. The wife makes extensive reference to the alleged wealth of the husband's family. An examination of her own allegations at para 5 of her affidavit in support of the application quite clearly acknowledges that the properties belong to the husband's parents and the husband's mother's family company, that is properties belonging to the husband's mother's siblings. None of this wealth belongs to the husband. Even by the wife's own account, the husband has always lived in his parents' home and had his expenses met by his parents in their home and not separately. I think the husband's parents' station in life cannot be ascribed to the husband. The fact of the matter is that the husband does not and never had the means to pay for the children to attend school at Alice Smith. Both parties have said and it is a fact that the husband's parents were the ones who paid for the children's school fees at Alice Smith. On the facts, the husband's parents had good reason and just cause to withdraw their generosity. From 21 April 2003 to 11 July 2003, the wife refused to send the children back to the husband parents' home after access in breach

of the custody orders and thereafter kept the children cloistered in the apartment and wilfully refused to allow the children to attend the whole third school term, ie some three months. The third term school fees paid by the petitioner's parents of RM15,059 had already been forfeited by the school. At the point when the term fees for the next academic year of RM18,008 had to be made, there was no prospect of the wife sending the children to school. She had refused despite repeated demands. the husband's parents quite justifiably refused to pay. the husband's parents have no legal obligations in the first place to pay for the school fees. There is no such obligation in our law. They cannot, by reason of their generosity in the past, be now bestowed with such a legal obligation whether directly or indirectly. Furthermore, against the background and facts of the present case where they had paid and lost that money thrown away by the acts of the wife, it is unconscionable that they should be made to pay at all. I am of the view that this court must look only at the husband's means and any order must be within his means. It is seen that neither the husband's means nor his station in life at the current time justifies the provision of maintenance for the children in the amount claimed by the wife of RM6,800 and the payment of school fees at Alice Smith.

[10] I now come to the wife's counsel's submission which state that the husband has failed to provide full and frank disclosure of his means. I think the wife's counsel's submission on the issue of disclosure in law on the facts of the present case is misconceived and wrong. Upon the wife filing her application for maintenance vide her summons in chambers, the husband had filed his affidavit in reply exhibiting his income and the basis upon which the company which employs him was set up. The husband has provided the information required by this court to make an order for interim maintenance. The duty of frank and full disclosure as envisaged by the wife's counsel's submission is only intended where there is a notice to proceed with an application for ancillary relief ('notice'). No such notice has been served on the petitioner husband in these proceedings. The application before this court by the wife is merely by way of a summons in chambers for interim maintenance. It is only upon service of the notice that r 61 of the Divorce and Matrimonial Proceedings Rule 1980 ('Rules') and the inferences are applicable. This is because r 61 imposes on the party who is served with a notice in Form 11 or 13 in respect of an application for ancillary relief a mandatory duty to file an affidavit in answer to the application containing full particulars of his property and income. Rule 61 of the Divorce and Matrimonial Proceedings Rule 1980 provides:

(1) A petitioner or respondent who has applied for ancillary relief in his petition or answer and who intends to proceed with the application before a registrar shall, subject to r 84, file a notice in Form 12 and within four days after doing so serve a copy on the other spouse.

(2) When a respondent or petitioner is served with a notice in Form 11 or 13 in respect of an application for ancillary relief, not being an application to which r 62 applies then, unless the parties are agreed upon the terms of the proposed order, he shall, within 14 days after service of the notice, file an affidavit in answer to the application containing full particulars of his property and income, and if does not do so, the court may order him to file an affidavit containing such particulars.

(3) Within 14 days after service of any affidavit under para (2) or within such other time as the court may fix, the applicant shall file an affidavit in reply containing full particulars of his property and income.

[11] Also an obligation arises by virtue of r 65(4) of the Rules wherein:

> Any party to an application for ancillary relief may by letter require any other party to give further information concerning any matter contained in an affidavit filed by or on behalf of that other party or any other relevant matter, or to furnish a list of relevant documents or to allow inspection of any such document, and may, in default of compliance by such other party, apply to the registrar for directions.

[12] It is clear that the husband in these proceedings was never served with a notice to proceed with ancillary relief, nor was he requested by letter to give 'further information', and accordingly the inference of lack of full and frank disclosure as contended by the wife does not even arise. Further in *Leow Kooi Wah v Phillip Ng Kok Seng & Anor* [1997] 3 MLJ 133, Mahadev Shankar J (as he then was) quoted *J v J* [1955] P 214, where it was observed that (at p 144):

> The effect has been that owing to the husband's grossly defective affidavit of documents, his failure to put before the court documents, the reticencies in his long examination-in-chief, and his complete omission to keep or produce (I know not which) books of account, there have been kept from the court vital facts which he ought to have made plain…
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> For a husband in maintenance proceedings simply to wait and hope that certain questions may not be asked in cross examination is wholly wrong.

His Lordship in *Leow* then concluded that (at p 144):

> The cross-examination of the respondent produced disclosures which cannot be reconciled with his affidavit that his total income in 1991 was RM1,768.25

[13] Hence, it is apparent from the aforesaid that there must be in the first place the process by which demands were made, documents exchanged, and cross-examination had taken place, before any adverse inference can be drawn against the said party with respect to such means. Such circumstances are not present in these proceedings before me.

[14] With regards to the case of *Lim Bee Kee v Leong Ah Chuan* [1998] 1 MLJ 675 cited by the wife's counsel as having held that the duty as expressed in *Leow* is applicable in maintenance proceedings. I think it is wrong in law. The facts of the case show it was an application for a variation of a maintenance order which had originally been made consequent upon a divorce, and not an interim application for maintenance prior to divorce as in the present application. I am unable to ascertain whether in *Lim Bee Kee* the contention that the duty only arises upon a notice being served pursuant to r 61 was ever raised by counsel for the respondent. This contention may not have been raised and accordingly the decision that the duty applies in all maintenance proceedings I conclude is given per incuriam. A clear reading of *Leow* shows the circumstances when inferences applies. In the circumstances, *Lim Bee Kee* was wrong to have held that the duty arose with due

process having been gone into. In any event, the facts show that *Lim Bee Kee* concerned the variation of an order obtained in divorce proceedings wherein the duty pursuant to the Rules as to disclosure may be said to have already arisen. Having already arisen, the obligation must be continuing in all subsequent applications with regard to the orders made. The extent of the husband's duty of disclosure in these interim proceedings cannot be equated to the mandatory duty of a party who has been served with a notice to proceed with ancillary relief expressly set out in the Rules. the husband in this application has been forthcoming in his affidavits. At no point had the wife raised any issue with regards to the husband's credit cards or his ability to raise money through any bank. Not having raised these issues in her affidavits, the wife cannot now say that the husband has failed to provide this information such as to bring about an adverse inference. If indeed such an inference is drawn, the wife should have applied for an order to cross-examine the husband on his affidavits.

[15] The LRA provides for the importation of English principles when deciding matrimonial cases in the Malaysian courts. Section 47 of the LRA provides that:

> Subject to the provisions contained in this Part ('Part VI -Divorce'), the court shall in all suits and proceedings hereunder act and give relief on principles which in the opinion of the court are, as nearly as may be, conformable to the principles on which the High Court of Justice in England acts and gives relief in matrimonial proceedings.

[16] Hence, English law currently prevailing on a matter may be imported and applied in the Malaysian courts to resolve the situation, in relation to and subject to local provisions in Part VI of the LRA 1976. Section 47 of the LRA is not applicable on the facts before me and in these proceedings because such English principles can only be applied in Malaysia where there are no specific provisions in our own statute regarding a particular matter. On the facts before us, there are clear provisions in the LRA with regards to maintenance and the assessment thereof. Where there are specific provisions, the English principles and cases may be applied to assist in interpretation only if they are similarly worded statutes or provisions and, even in that even English decisions, are merely of persuasive effect. The Court of Appeal case of *Ching Seng Woah v Lim Shok Lin* [1997] 1 MLJ 109 is clear and unequivocal on this point, with the learned judge Mahadev Shankar JCA (as he then was) stating that:

> … Whilst s 47 refers to English principles we should always keep in the forefront of our minds that when the Act (ie the LRA) was first initiated we were breaking new ground. It was then necessary to look to English case law because we had adopted much of the wording of the corresponding English statute. In the two decades which have since passed, we have injected enough local experience into the application of the provisions of Pt VI of the Act to become acutely aware that the differences between the social and cultural aspirations with regard to marriage, divorce and welfare in England and Malaysia are such that much caution is called for before we adopt modern English attitudes. The measures we take today to preserve the integrity of the Malaysian family when it is threatened by the calamity of divorce must be determined in the light of the Malaysian conditions. At best therefore the English reports should only be regarded as being of persuasive value or as case studies why the family as unit is progressively disintegrating in that country…

[17] I conclude that as regards the wife's application for maintenance herein, s 47 of the LRA would not work to allow English principles regarding the same to be imported into these proceedings as there already exist clear and specific statutory provisions in Malaysian law in respect of the provision and assessment of maintenance. The Malaysian provisions on maintenance contained in ss 76 and 92 of the LRA (in respect of a spouse's maintenance and children's maintenance, respectively) bear no resemblance whatsoever to the English provisions on the same as used in the cases of *M v M (Maintenance Pending Suit)* (2002) 2 FLR 123 and *Thomas v Thomas* (1995) 2 FLR 668, cited by wife's counsel. As such, the said English decisions cannot shed any light on the interpretation of our own statutory provisions on maintenance, and the principles expounded therein cannot be applied. These cases are merely persuasive authority, and that secondly, both cases are factually and legally distinguishable from the present proceedings before me on the following grounds:

(1) the wording of the English statutory provision in relation to maintenance in the English cases differ substantially from the test laid down in our Malaysian statute ('the LRA');

(2) The matters which the court must have regard to in deciding maintenance orders in the United Kingdom are set out in s 25 of the Matrimonial Causes Act 1973 ('the MCA 1973') and s 25 of the MCA 1973 enjoins the court to have regard to 'all the circumstances of the case' including specifically (under s 25(2) MCA):

(a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future, including in the case of earning capacity any increase in that capacity which it would in the opinion of the court be reasonable to expect a party to the marriage to take steps to acquire;

(b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;

(c) the standard of living enjoyed by the family before the breakdown of the marriage;

(d) the age of each party to the marriage and the duration of the marriage;

(e) any physical or mental disability or either of the parties to the marriage;

(f) the contributions which each of the parties has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution by looking after the home or caring for the family;

(g) the conduct of each of the parties [whatever the nature of the conduct and whether it occurred during the marriage or after the separation of the parties (as the case may be) dissolution or annulment of the marriage], if that conduct is such that it would in the opinion of the court be inequitable to disregard it;

(h) in the case of proceedings for divorce or nullity of marriage (this phrase is repealed), the value to each of parties to the marriage of any benefit,

for example a pension (this phrase is repealed) which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring…

[18] I think the salient point remains that the Malaysian statutory provisions are completely different to the provisions applicable in England. The English provisions have specifically allowed for a consideration of 'all the circumstances of the case' and it is in consideration of these circumstances that a person's other financial resources, including monies obtained from parents, are considered. Furthermore, the facts of the cases referred to by counsel for the wife are also distinguishable from the facts in our case:

(i) the facts before us are not facts whereby an order of financial assistance from the husband's parents arose as in *M v M* and *Thomas v Thomas*;

(ii) the husband in our present case and his family benefited from the parents' generosity as a result of staying under the same roof. The Petitioner's household expenses were met while he remained in the parents' home;

(iii) in contrast in *M v M*, the husband was deriving a direct income from companies controlled by his father and/or in which the husband had an interest, with supplemental payments only being given by the father. The husband and wife in *M v M* were always staying at the relevant times in properties either partly owned or partly financed by the husband himself;

(iv) the husband's parents here have good grounds to refuse to continue their generosity and expressed that they no longer wish to continue providing this largesse to the husband and/or his family if they are not living in their household and in the light of having had money generously expended by them forfeited;

(v) the wife has herself repeatedly derided and made derogatory and disparaging remarks about the husband being 'parasitic of his parents'. She has not denied his allegation that in these proceedings she had 'castigated, belittled and ridiculed' them and 'whose generosity over the years she had mocked and shown no appreciation whatsoever' (see para 16.3 of the husband's affidavit in reply, encl 170);

(vi) the husband's parents are both elderly and retired. Their own funds are limited.

[19] I therefore conclude that the principles in *M v M* and *Thomas v Thomas* are not applicable here.

[20] As regards the wife's counsel's statements concerning the petitioner's salary scale in relation to the company Newborn & Child Health Services Sdn Bhd, it must be borne in mind that the husband's parents and the husband's sister have invested in the said company, and accordingly their investment is reflected by their shareholdings. It is clear that the husband receives a nett income of RM2,691.90 which he would not have been in a position to receive if his parents and sister had not invested in the said company in the first place and provided the funding. He had

A been studying all these years to become a doctor (funded by the parents) and had up until now only worked at Selayang Hospital to complete his term of compulsory government service until last year. It is inequitable and unwarranted for the wife to presume that the husband should automatically receive a high income from the company notwithstanding the investments made by the husband's parents and sister and their consequent expectation of a return of their own from their investment.

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[21] The issue of the Australian property raised by the wife in her counsel's submission is not relevant or applicable. The fact is that the property is not in the name of the husband and is not available for consideration on the facts before me. The property in Australia was paid for entirely by the husband's parents. the husband had no source of funds of his own to buy the property. The transfer of the Australian property to the Petitioner's sister was effected in 2000, for valuable consideration. The said property is no longer owned by the petitioner. Unless the transfer of the property is set aside (if so entitled), the disposition of the property is inviolate, and cannot be brought into question in this application for maintenance. If at all there is entitlement, I think the issue is properly one in relation to division of assets.

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[22] The husband is unable, on his income to pay for the rental of the apartment where the wife is currently residing. the husband had suggested even in the proceedings in the High Court before that the wife vacate the apartment for alternative accommodation within his means, near the Selayang Hospital. The husband's proposal was rejected by the wife. She insisted on continuing to stay at the U' Thant apartment despite the rental being RM2,000, the equivalent of the husband's income as a government doctor at that time (see exh 'AD-12' of the husband's second affidavit in reply), the husband's parents were never under any obligation to pay the rental for the said apartment. In fact the husband's parents had agreed to provide for the rental of the said apartment for the six months when the husband and the children had joined the wife at the said apartment. the husband having only recently entered private practice and being paid RM3,000 per month gross salary (after compulsory deductions his nett salary is RM2,691.90), he is in no financial position to pay the rental of the respondent's apartment which comes to RM2,000 a month. Under Malaysian law (English principles on maintenance not being applicable to Malaysia by virtue of the fact that s 47 of the LRA excludes the importation of English principles where there are express provisions on the particular matter in our Act), the husband's parents are under no legal obligation to pay for the apartment on our facts, nor do they have any wish to do so for all the reasons set out abovementioned. There is no collusion to evict the wife from her apartment. It is simply that, under the circumstances, there is no viable way in which to finance the said apartment.

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[23] Specifically in response to the wife's counsel's submissions on the principles quoted from Lionel Rosen on Matrimonial Offences, that the standard of living of the wife and the children should not be relegated to significantly lower standard of living than the husband enjoys has been quoted out of context. In actuality, Lionel Rosen has clearly stated that his principles applies specifically in relation to 'breaches

I

of cohabitation' where 'cohabitation has been disrupted by a matrimonial offence on the part of the husband'. No such 'matrimonial offence' exists on the part of the husband in these proceedings. In fact, cohabitation in these proceedings was disrupted because the wife unilaterally left the husband's parents home where the family was staying and by her own account 'packed (her) suitcase and took up on Joy (my mother in law's sister) offer to use her apartment'. Therefore, this principle cited at Lionel Rosen on matrimonial offences does not come into play against the husband in these proceedings. In any event the standard of living of the wife is not 'significantly lower' than the husband. The husband's parents' standard of living cannot be ascribed to him. In relation to the husband's parents', it is their voluntary generosity and free will to provide for their son who lives with them in their home. It would be inequitable to countenance the wife's' attempt to jump on the bandwagon and seek to live off the husband's parents' generosity when she is the one who disrupted cohabitation in the first place, and when she has been significantly rude, malicious to and derogatory of the petitioner's parents in her affidavits.

[24] In relation to the wife's counsel's submissions regarding the making of an inference that the husband could obtain credit, on the facts, I note that the case of *Newton v Newton* (1990) 1 FLR at p 34 cited by the wife's counsel is certainly not at all on all fours with the present proceedings. Indeed, in *Newton*, the husband was a successful investor who regularly and with great success procured credit facilities from various quarters. As such, in Newton where the husband had not been forthcoming regarding further credit that he could receive, it was only reasonable to assume from his successful credit history that he could obtain the relevant credit. It was also observed in *Newton* that the husband was not a credible witness in relation to his liabilities and overdrafts. The circumstances in the current proceedings are vastly different from *Newton*. The petitioner husband here is certainly not an experienced investor who has frequently and successfully obtained credit from various institutions. It would be unjust to infer that he could indeed do so when he has no prior history of applying and/or succeeding at the same time.

[25] With regard to the wife's counsel's submission that 'the ability of the husband' might, in certain circumstances, include the ability to provide money by way of overdraft or through loans', counsel has categorically failed to disclose what these 'certain circumstances' are or if they exist in these proceedings. the husband is now merely starting out in his career and is not in a secure financial position to engage in obtaining loans or overdrafts, a fact which resulted in his parents and his sister having to assist to raise funds for the company Newborn & Child Health Services.

[26] The wife's counsel's submission that the court can take into account the husband's potential earning capacity, citing *McEwan v McEwan* [1992] 2 All ER 708 is again misguided. There are no provisions in our LRA to enable this consideration as there is in s 25 of the English Matrimonial Causes Act 1973. Furthermore, as the full case has not been provided in the respondent's bundle of authorities, the respondent should not be allowed to rely on their contention as to the principles evinced by the said case, as the rationale and judgment of the case is not available for perusal by this court. In any event, it appears that this principle that the courts can

take into account the husband's potential earning capacity 'is a proper exercise of their (justices) duty under s 2(1)(b) of the Matrimonial Proceedings (Magistrates' Courts) Act 1960, as amended, to order that 'he husband shall pay to the wife such weekly sum as the court considers reasonable in all the circumstances of the case' …' From this quotation, it is clear that this principle is derived from an English statutory provision on weekly maintenance, which I think has not in any way been adopted or is otherwise present in our statutory provisions. As such, this court is not constrained to follow the same.

[27] To conclude, I am of the opinion that the husband is under no obligation to provide for the wife's and children's maintenance while the children remain in the physical care of the wife in blatant breach of the custody orders, both interim and final, granting the husband full guardianship, custody, care and control of the two children. The stay of execution of the final order does not extinguish the final custody order. The wife's appeal against the final order is fixed for hearing on 11 October 2004, a mere two weeks away, at which juncture this application for interim maintenance may become academic. The wife cannot be allowed to consolidate her wrongful position by obtaining an order for maintenance in her favour. The stay of the final custody order does not act to reverse the said order, but merely stays the execution of the same until the Respondent's appeal is disposed of. This court would seek to maintain the status quo and not countenance and consolidate the wife's reprehensible conduct in holding the children in contravention of the custody orders granting custody to the husband, by making the orders applied for by the wife herein. The Malaysian provisions as set out in the LRA are clear. In relation to the wife, the means and needs of the parties; while with regards to the children, the means of the husband and his station in life and not the station in life of his parents. In this regard, the means of the husband is his salary of gross RM3,000 and nett RM2,691.90 after EPF deductions. the husband's income at Gleneagles must be considered in the light of the fact that his practice at Gleneagles is only six months old. Any new practice will take time to turn around and see a profit especially where there had to be a huge initial capital outlay to start any practice (for which he has had to raise a loan from Bangkok Bank) and he is in competition with five other established practitioners and experienced consultants in the same hospital. the husband had only just left government practice at the end of last year. He is only starting out in his career in private practice, and cannot possibly be on par with the other experienced consultants in Gleneagles with whom the petitioner is now in competition. Indeed, in these circumstances, it is absurd for the respondent wife to expect the husband to have, automatically upon leaving government service, become a wealthy private practitioner at Gleneagles. The wife has not proved her needs. Counsel for the wife's contention that an adverse inference should be made is wrong in law. The onerous obligation imposed by the r 61 of the Divorce and Matrimonial Proceedings Rules 1980 arises only upon a notice of application to proceed with the hearing of ancillary relief having been served upon the husband. That is not the case here. Neither can the English cases referred to by the counsel for the wife apply to this application, legally or factually. Our Malaysia LRA has our own specific considerations when deciding maintenance and the English provisions of matters of

consideration set out under s 25 of the English Matrimonial Causes Act 1973 do not apply in Malaysia. Accordingly, the respondent's application is hereby dismissed. Each party bears its own costs.

Respondent's application dismissed with each party to bear its own cost.

Reported by K Krishnan